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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1066

PAUL A. GORIN, HENRY GRILLO,
AND SAUL GLASSMAN,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners pray that a writ or writs of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause on February 20, 1963.

In accordance with Rule 23 (5), the petitioners file herewith a single petition, their appeals in the lower court having been heard on a printed Consolidated Record Appendix, hereinafter designated as "R".

Opinion Below

There was no opinion in the United States District Court for the District of Massachusetts. The opinion of the Court of Appeals for the First Circuit is reported in 313 F.2d 641 and is annexed hereto as Appendix A.

Judgments Below

The judgments of the United States District Court for the District of Massachusetts were entered on March 19, 1962 (R. 12) and are set out at R. 1370-1374.

The judgments of the Court of Appeals for the First Circuit are annexed hereto as Appendix B.

Jurisdiction

The judgment sought to be reviewed is dated, and was entered, February 20, 1963.

A petition for rehearing, filed by the Government, was denied by the Court of Appeals on April 3, 1963.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22 (2).

Questions Presented

1. Whether the indictment should have been dismissed because of prejudicial pre-indictment publicity inspired by government officials.

2. Whether the indictment should have been dismissed because returned by a grand jury selected in violation of 28 U.S.C. 1861.

3. Whether the motions of the petitioners for judgments of acquittal should have been granted on the basis that the defense of entrapment was made out as a matter of law.

Statutes Involved

The statutes involved in this case are 18 U.S.C. 201, 18 U.S.C. 371, 18 U.S.C. 1905, 26 U.S.C. 7213 (a) (1), 26 U.S.C. 7214 (a) (4), 28 U.S.C. 1861, and Massachusetts General Laws, Chapter 234, Section 1.

The pertinent text of these statutes is annexed hereto as Appendix C.

Statement

On September 6, 1961, an indictment in three counts was returned against the three petitioners and one other defendant, Nathaniel Bergman.[1] Count One charged all four defendants with conspiring to bribe Charles J. McCaffrey, an employee of the Treasury Department, and to defraud the United States in its governmental functions, in violation of 18 U.S.C. 371. Count Two charged all defendants except Grillo with having, on June 27, 1961, and June 28, 1961, bribed McCaffrey by giving him ten thousand (10,000.00) dollars, in violation of 18 U.S.C. 201. Count Three charged petitioner Grillo only, as a Treasury Department employee acting in connection with the revenue laws of the United States, with having conspired with the other three, named as co-conspirators but not as defendants, to defraud the United States in its governmental functions, in violation of 26 U.S.C. 7214 (a) (4) (R. 15-21).

Each petitioner pleaded not guilty.

Each petitioner moved to dismiss the indictment because returned by grand jurors calculatedly prejudiced against

[1] Bergman is not a petitioner here. He was convicted on the two counts in which he was named as a defendant and was sentenced to an eighteen month term of imprisonment (reduced from three years). He withdrew his appeal to the Court of Appeals and is now serving that sentence concurrently with a sentence imposed in the District of Connecticut on a conviction of tax evasion.

petitioners by governmentally inspired publicity (R. 21, 24, 30). These motions were supported by evidence of newspaper articles, marked Exhibit A (R. 40), dated Saturday, August 26, Sunday, August 27 and Monday, August 28, 1961, respectively. In these articles Attorney General Robert Kennedy was quoted as saying:

> "The case was investigated vigorously and skillfully by the Inspection Service of the Internal Revenue Service. Actions of (I.R.S. Commr. Mortimer) Caplin and the men of the Inspection Service reflect the integrity of the Internal Revenue Service and are in the highest tradition of the Federal Service.
>
> "Mr. McCaffrey is a courageous American and typifies the loyalty and integrity of the men of the Internal Revenue Service."

Nine days after publication of the last article complained of, the petitioners were indicted.

In addition, each petitioner in a joint motion, moved to dismiss the indictment on the further ground that the list from which was drawn the grand jury which returned the indictment was drawn contrary to law (R. 1329). Evidence adduced in support of this motion established that the grand jurors were selected by the jury commissioners of the United States District Court for the District of Massachusetts from the jury lists of the various cities and towns in Massachusetts (R. 110-111) and that the Boston Election Commission, which is charged by local law with the annual preparation of jury lists for the City of Boston, selected jurors solely from the lists of registered voters in the various wards of the city. Then, by reference to the list of inhabitants prepared annually by the city police department, the Commissioner eliminated those exempt from

jury service by the General Laws of Massachusetts, Chapter 234, Section 1 (R. 114).

The two above-described motions, as well as all other pre-trial motions, were denied by the trial court.

Trial by jury commenced on January 3, 1962, and continued for more than six weeks through February 20, 1962.

According to the evidence most favorable to the Government,[2] the tax returns of Bergman had been under investigation by the Intelligence Unit of the Hartford Office of the Internal Revenue Service since June, 1959. Bergman retained a Hartford attorney, one Burney, to represent him (R. 282). Some time before June, 1961, when the case was about to come under the jurisdiction of the Boston Regional Office of the Internal Revenue Service, the petitioner Paul Gorin, who practiced law in Boston, was retained to act as co-counsel (R. 889). On May 25, 1961, Charles J. McCaffrey, Chief of Enforcement in the Office of Regional Counsel, Boston, assigned the case for review to one Griffin (R. 956-957).

McCaffrey and the petitioner Glassman, who was a Boston attorney, had known each other since April, 1960, when they joined a United States Marine Corps Reserve voluntary training unit (VTU) consisting of reserve officers who were lawyers (R. 436). Early during their acquaintance, McCaffrey told Glassman how profitable the private tax law practice was and suggested that Glassman take courses in tax law (R. 446-447). At some time before May 31, 1961, McCaffrey learned that Glassman did not have a Treasury Card (R. 441). Up to May, 1961, Glassman never had contacted McCaffrey about any case in Enforcement (R. 243).

[2] Conversations to which McCaffrey was a party are given here according to McCaffrey's version of them. Glassman was the only defendant to testify and his version is used for other conversations to which McCaffrey was not a party.

On May 27, 1961, Glassman happened upon Gorin at a health club in Boston, inquired whether Gorin had a case in Enforcement, said he had a friend there, and invited Gorin to call him at the beginning of the next week (R. 1142-1143).

On May 31, Gorin met with Glassman by prearrangement and inquired how Glassman knew Gorin had a case in Enforcement. Glassman replied that he had a friend there, but was non-committal to the query whether he could "do anything" with the case. Gorin informed Glassman of the name of the case and that it was a net worth case. Glassman stated that he would speak to his friend and call Gorin (R. 1144-1145).

On the same day, May 31, Glassman called McCaffrey and said that he wanted to talk with McCaffrey about a case in McCaffrey's office and would see him at the VTT meeting that night. When McCaffrey stated that he could not attend the meeting, Glassman said he would call the next morning (R. 244-245). On that day, as well, McCaffrey wrote to Gorin, suggesting a conference on the Bergman case for June 13 (R. 526-527).

The next day, June 1, Glassman called McCaffrey and requested a conference. Glassman identified the case when asked by McCaffrey (R. 249-250).

At this point, McCaffrey knew it was his duty to refuse to discuss the case with Glassman, but nevertheless granted Glassman's request for a conference (R. 454). McCaffrey also knew that Gorin was attorney of record at the time (R. 504). At the conference, McCaffrey, in conceded violation of law, disclosed to Glassman the amounts of the civil deficiencies and that Bergman had some $48-savings bank accounts (R. 251-252).

According to Glassman, he called Gorin upon returning from McCaffrey's office and the two met either the same

day, June 1, or the next (R. 1149). Glassman gave Gorin the information received from McCaffrey. Gorin responded by saying, "I never knew this information could get out" (R. 1150). Glassman suggested a $1,000 retainer to look into it further. Gorin said he would ask Bergman, but they were considering using another attorney (R. 1150).

On June 6, McCaffrey called Glassman and went to Glassman's office on VTU business. Glassman mentioned that he expected a visit from a friend of Bergman and would get in touch with McCaffrey later (R. 254).

On June 8, McCaffrey and Glassman were together at a VTU meeting, but there was no discussion of the Bergman case (R. 473-474).

The next day, June 9, according to Glassman, he called Gorin to inquire whether any decision had been made. Gorin stated that he did not know and would call Glassman at the beginning of the week (R. 1152).

On June 12, Gorin called Glassman and told him that he had spoken to Bergman. He said he thought Bergman was agreeable to the $1,000 retainer, but Bergman first wanted to talk to Glassman. An appointment was made for the next day (R. 1153).

On June 13, Glassman met with Gorin and Bergman. Gorin told Bergman, in Glassman's presence, that the information obtained by Glassman from Regional Counsel's office indicated that "he must have a pretty good friend up there." Bergman agreed to the retainer and Gorin guaranteed its payment (R. 1154).

On the night of June 14, McCaffrey and Glassman met at a regular VTU meeting (R. 254-255). After the meeting, Glassman told McCaffrey that he had told Bergman's "friend" that he wanted $35,000[3] if the case were killed

[3] Glassman denied any reference to his fee on this occasion (R. 1156), whereas McCaffrey's version has Glassman mentioning his fee on June 14 and, again, on June 20 (R. 256, 341).

in McCaffrey's office and that the money would have to be put in escrow (R. 256).

On June 15 or 16, Glassman called Gorin to arrange an appointment. The two met on June 16 and, when Glassman inquired what the fee should be, Gorin suggested $25,000 or $30,000. Glassman was agreeable. Gorin stated that he would talk it over with Bergman and be in touch with Glassman (R. 1157-1158).

On June 19, according to Glassman, Gorin called him to say that he thought Bergman was agreeable to the fee, but that Bergman wanted to talk personally to Glassman again (R. 1158). The next morning, Gorin and Glassman arranged to meet Bergman that night (R. 1159).

On June 20, McCaffrey called Glassman and told him that the Bergman case had been transferred back to him from the lawyer to whom he had assigned it and that "I would thereby have better control over the case." Glassman said, "Wonderful," and that he would be right over (R. 264-265).

On the same day, June 20, at McCaffrey's office, Glassman said that he was asking $30,000 in escrow. McCaffrey again gave him the "exact civil deficiencies" and said that, if Glassman was satisfied with ten per cent for his fee, that was all right (R. 341, 512-513). Glassman stated that Bergman would put up a good part of the fee in cash (R. 341).

McCaffrey then said, "Saul, we know what we're talking about. Let's lay it on the line. What do you have in mind for me?" Glassman replied, "Anything you ask" or "Anything you fix" (R. 341). Subsequently in the same conversation, Glassman stated that McCaffrey should get between ten and fifteen thousand dollars (R. 342). McCaffrey said that Glassman should be sure to have the money before the "thing went through." Glassman said he would see Bergman that night (R. 342-343).

According to Glassman, he did meet with Gorin and Bergman that night. Glassman asked Bergman for a $50,000 fee (one-half of which Glassman intended to give Gorin). To Bergman's inquiry as to why the money had to be paid in cash, Glassman responded, "It's none of your business." Bergman finally agreed to pay the requested fee, $15,000 of it in cash (R. 1176-1177).

On the following night, June 21, McCaffrey met Glassman before the VTU meeting. Glassman stated that Bergman had agreed to his terms (R. 345). McCaffrey stated that he would have a Criminal Action Memorandum (CAM) recommending no criminal prosecution drawn by the following Tuesday, June 27 (R. 345-346). Later on in the evening, McCaffrey asked to talk to Glassman again and suggested that someone might want to read the CAM. Glassman stated that he thought he had better look at it. McCaffrey stated that he would bring the rough draft of the CAM to Glassman's office at 2:00 P.M. on the following Tuesday, June 27 (R. 346-347).

That night, according to Glassman, he called Gorin and told him to tell Bergman to have the money ready by the first of the next week (R. 1191).

The next day, June 22, McCaffrey called Glassman again and confirmed the appointment at Glassman's office for June 27 (R. 498).

On June 26, Gorin told Glassman that Gallo would get the CAM when it reached Intelligence (R. 1212).

On the morning of June 27, Bergman came to Glassman's office with Gorin and gave Glassman $15,000 in $100 bills (R. 1114-1196).[4]

At approximately 2:00 P.M. of the same day, June 27, McCaffrey went to Glassman's office and delivered a rough

[4] The Court of Appeals erroneously stated that "Glassman obtained the money from Gorin who in turn had obtained it from Bergman." (Appendix A, at page 8.)

draft of the CAM to him. Glassman read the CAM (R. 347-348). Glassman stated that Grillo had been approached and was "ready" for the arrival of the CAM at the Office of Regional Intelligence (R. 349). McCaffrey brought up the subject of Gorin being shown the draft CAM (R. 559), suggested a photostat be made (R. 350, 557), and then said, referring to Gorin, "Let him look at the copy, go over it, write me a back-dated letter" (R. 557), the ostensible purpose of the letter being to support the CAM and to make the Government file appear logical (R. 349-350).

Later that afternoon, Gorin came to Glassman's office in response to Glassman's call made in McCaffrey's presence (R. 350, 1119). Glassman gave Gorin $5,000 in cash and showed him the photostat of the CAM as had been previously suggested by McCaffrey (R. 1119-1120). Gorin gave Glassman a check for $7500. This was in accordance with a new fee arrangement whereby Glassman accepted a fixed fee of $17,500 (including the $10,000 cash given McCaffrey) regardless of the outcome of the case in Washington (R. 1218). During that same afternoon, Glassman told Gorin for the first time that he had paid out $10,000 to McCaffrey, although he had actually paid only $5,000 and intended to pay the remaining $5,000 upon delivery of the smooth CAM (R. 1131, 1218-1219).

On June 28, McCaffrey went to Glassman's office again and was given the second, and final, installment of $5,000 (R. 271).

On July 7, McCaffrey called Glassman to tell him that he had received "howls" from Mr. Deneen, Grillo's superior, concerning the CAM (R. 275). During that conversation, Glassman invited McCaffrey to pick up the back-dated letter which had been prepared by Gorin in accordance with McCaffrey's original suggestion to Glassman (R. 275).

On July 10, when McCaffrey went to Glassman's office to get the letter, he stated to Glassman, "I hear that Deneen is away on vacation. In his absence then, Grillo is the man. It is time for him to act" (R. 379).

After returning to his office, McCaffrey, on the same day, called Glassman to tell him that he had received a letter from one Murphy, Chief of Intelligence in the Hartford District Office, to the effect that Murphy intended to file a vigorous protest to the CAM (R. 277).

On July 13, McCaffrey called Grillo directly and "broached the subject of the Bergman case" to Grillo (R. 280). The call, however, failed to evoke any response from Grillo.

On the next day, July 14, McCaffrey received a letter from Gorin's co-counsel of record, Hurney, inquiring as to the result of the conference which had been rescheduled for July 6 (R. 283-284). This conference had, in fact, not taken place, having been made unnecessary by the CAM (R. 295).

In the morning of July 19, McCaffrey called Glassman, who requested McCaffrey to take the Hurney letter with him to the VTU meeting of that evening (R. 282). McCaffrey also called Grillo that morning and invited him to visit McCaffrey's new offices. This call to Grillo also produced no results (R. 658, 761-762).

On that evening, at the VTU meeting, Glassman delivered to McCaffrey a legal brief from Gorin and was shown the Hurney letter (R. 284, 377). McCaffrey subtly suggested that he be permitted to call Gorin directly. He testified as follows:

> "I said that I was a little bit upset about it, because it had come in through the front office, it had been hand-stamped and logged in, and I said to Glassman that my first impulse was to call Gorin and be a little

bit indignant about it and ask him weren't the co-counsel speaking to one another" (R. 377).

On cross-examination, McCaffrey admitted, further, that he said to Glassman, with reference to his intended call to Gorin concerning the Harney letter:

> "And Gorin, I hope, will say, 'Look, Mac, I'll take care of it'" (R. 659).

Moreover, McCaffrey conceded that he wanted Gorin to take some action and that he encouraged it (R. 659).

Then, on the morning of July 20, McCaffrey telephoned Gorin directly (R. 292-293), beginning the conversation with a friendly, "Hello, Paul" (R. 664, 667-668).

There then follows a series of meetings between Gorin and McCaffrey on July 20 (R. 293), July 25 (R. 298), July 27 (R. 300-301), August 1 (R. 307), August 3 (R. 308-309), and August 8 (R. 310). These were followed by a meeting between McCaffrey, Bergman, and Gorin on August 14 (R. 321) and again on August 15 (R. 324-325). On the latter date, Grillo joined the meeting, but only during Bergman's temporary absence (R. 327-328, 895-896).

During the course of these conferences, Gorin, who had known since June 27 that McCaffrey had accepted a bribe from Glassman, was drawn quickly and surely into the original McCaffrey-Glassman conspiracy. On two occasions, in response to direct inquiries from McCaffrey, Gorin stated that he had paid Grillo $1500 (R. 554).

On July 20, at the first McCaffrey-Gorin conference, Gorin mentioned a difference in fee from $10,000 to $50,000 where a case is "killed" in the Office of Regional Counsel as compared with that of Regional Intelligence (R. 381). To this McCaffrey responded, without any mention by Gorin of an intent to share his fee with McCaffrey,

"This is music" (R. 677). At this conference, Gorin asked McCaffrey what he wanted done concerning the Hurney letter. McCaffrey suggested that Gorin obtain an exclusive power of attorney (R. 679).

On July 25, Gorin delivered to McCaffrey a revocation of the power of attorney of both himself and Hurney (R. 298-299, 679-680).

On July 27, Gorin invited McCaffrey golfing (R. 300-301). The day began with a complaint by McCaffrey that his clubs and bag were dilapidated (R. 680) and ended with Gorin's having given McCaffrey a new bag and set of clubs (R. 301).

On August 1, McCaffrey was Gorin's luncheon guest at a Boston restaurant (R. 386) and, on August 3, Gorin visited McCaffrey's office (R. 388).

On August 5, from a suburban Boston golf course, Gorin returned a call from McCaffrey to Gorin's office (R. 310, 389, 687). McCaffrey had received instructions to go to Washington concerning a certain Goldfine civil tax case and suggested to Gorin that he might also be interested in the matter (R. 389-390, 684). McCaffrey said that Gorin would have to come in that day or not at all because McCaffrey was required to leave for Washington that very afternoon (R. 686). To Gorin's excuse that he was at a golf course, McCaffrey urged that Gorin take a taxi (R. 687). To Gorin's excuses that he was dressed in golf shorts and unshaven, McCaffrey responded that that would not make any difference (R. 686).

Gorin finally relented and came to McCaffrey's office on that day (R. 692). Thereupon, McCaffrey, to Gorin's statement that the case was "important," responded by saying, "I know it's important but is it valuable?" (R. 692). This was conceded by McCaffrey to have been a pretended solicitation of a bribe (R. 692). Apparently,

nothing further was done on the matter by either McCaffrey or Gorin.

Similarly, other conversations between McCaffrey and Gorin concerning other cases that would be coming into McCaffrey's office never developed beyond the talking stage.

On August 10, McCaffrey again called Gorin's office. Gorin returned the call from a hotel in New Hampshire (R. 312). That evening, Gorin called McCaffrey to inquire about the official protest of Intelligence to the CAM. McCaffrey stated that it was a "formidable" protest and that "it might be necessary to get together" with Grillo. Gorin said that he would visit McCaffrey the following Monday, August 14. (R. 313).

In the morning of August 14, Gorin arrived at McCaffrey's office (R. 315). McCaffrey was critical of Grillo's inactivity in "watering down" the protest. He said that he needed help from Grillo. Gorin offered to call in Bergman, instead (R 392-393). McCaffrey also pretended to need additional data, which could be supplied only by Bergman (R. 897-898).

In the evening of the same day, August 14, Bergman joined McCaffrey and Gorin. During the course of the evening, McCaffrey made repeated references to the need for persuading Grillo both to confer with McCaffrey concerning the protest and to take some favorable action in the case at the Office of Regional Intelligence (R. 633-638).

On the next day, August 15, Grillo was finally lured into a conference with McCaffrey and Gorin (R. 638-640).

McCaffrey testified that he was at all times acting in the interests of the government and never intended to accept a bribe which would influence his decision in the Bergman case (R. 493).

On February 20, 1962, each petitioner was convicted on every count in which he was named as a defendant (R. 10).

Argument

A. *Motion to Dismiss Indictment because of Prejudicial Pre-Indictment Publicity Inspired by Government Officials*

Government officials issued a news release just before the Government's star witness, McCaffrey, was scheduled to testify before the grand jury. In that release, the Attorney General of the United States placed his imprimatur upon the courage, honesty, and loyalty of that witness. That news release, as could have been anticipated, was carried in newspapers published throughout Massachusetts.

Petitioners' contention, as expressed in their motion, presupposes, of course, either that there is a right under the Fifth Amendment to the Federal Constitution to be indicted, if at all, by grand jurors free of calculated,[5] governmentally instigated prejudice or that proper standards for the enforcement of the criminal law in the federal courts sanction only indictment by a grand jury uninfluenced by improper forces generated by the prosecutor.

At the outset, it should be noted that *Beck v. Washington*, 369 U.S. 541, does not foreclose the contention. Not only did that case deal merely with the rock-bottom requirements of the Due Process Clause of the Fourteenth Amendment, but it left unanswered the question whether a state prisoner has a federal constitutional right to have charges against him considered by a fair and impartial grand jury. The four members of the *Beck* majority, while indicating

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[5] In the sense meant by Frankfurter, J., dissenting, in *In re Sawyer*, 360 U.S. 622, 664, when he asked, "Even though the (prosecutor) may not have had a provable desire, the specific intent, to affect the pending trial and its outcome, are we really required to attribute to the (prosecutor) a child-like unawareness of the inevitability that (his) remarks would be reported and find their way to judge or jury, as they did?"

that it might be that "the Due Process Clause of the Fourteenth Amendment require(s) (a) . . . State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury," intentionally avoided the question by concluding that the State of Washington, so far as was shown by the record, did supply an unbiased grand jury in that case, 369 U.S. at page 546. Two members of the minority, Mr. Justice Black, with whom the Chief Justice concurred, assumed "the right of defendants to fair and impartial grand jurors." 369 U.S. at page 559. The third dissenter, Mr. Justice Douglas, said, "It is well-settled that when either the Federal Government or a State uses a grand jury, the accused is entitled to those procedures which will insure, so far as possible, that the grand jury selected is fair and impartial." 369 U.S. at page 579.

That there is such a right or standard, as petitioners claim under the Fifth Amendment and, alternatively, urge under the supervisory powers of this Court, seems clear. This case, at least, will present this important question squarely.

B. *Motion to Dismiss Indictment because of the Method of Selection of Grand Jurors*

The grand jury which returned the instant indictment was drawn from a list which systematically excluded persons not registered to vote (in violation of state, as well as federal, law) and, also, persons incompetent to serve by state law.

The Civil Rights Act of 1957 amended 28 U.S.C. 1861 by striking therefrom the provision disqualifying for federal jury service those persons incompetent to serve by state law. Now, any citizen who has attained the age of twenty-one years and has resided for one year within the

judicial district is competent to serve as a federal juror, with exceptions not pertinent here.

Assuming that the discrimination which occurred in this case (and, incidentally, is still occurring in the District of Massachusetts) did not amount to a violation of the Constitution, there remains the important federal question as to whether the Civil Rights Act of 1957 is to be given force as an extension of the constitutional requirements surrounding the selection of federal juries or is merely to be considered an idle direction of the Congress, to be disregarded so long as the requirements of the Constitution are met.

It cannot be gainsaid that the method of selection of jurors is of prime importance in the administration of criminal justice. It would seem to follow that the interpretation of a federal statute on the subject should be of equal importance to this Court.

C. *Motions for Judgment of Acquittal on the Basis of Entrapment*

This Court has not considered the law of entrapment since 1958 when it decided the *Sherman* and *Masciale* cases.[6] Both those cases presented the conventional entrapment situation of a direct solicitation of crime by a government agent. Such a situation is also presented here by the circumstance that the first suggestion to Glassman of any payment to McCaffrey was made by McCaffrey himself. This was confirmed unanimously by McCaffrey (R. 341, 486, 489), by Glassman (R. 1106, 1111), and by a government eavesdropper, Kiely (R. 135, 182), and was not contradicted by any other witness.

But, assuming that Glassman was not entrapped, the

[6] *Sherman* v. *United States*, 356 U.S. 369 (1958); *Masciale* v. *United States*, 356 U.S. 386 (1958).

case presents the novel questions as to how far the Government may go, and what methods it may use, in the encouragement of a person, like Glassman, suspected of having an intent to commit bribery, where it is known that such person will endeavor to enlist the assistance of other, innocent persons, like Gorin.

Specifically, on June 1, at McCaffrey's office, after Glassman had inquired merely whether the case was "strong" and whether it was "large" (R. 251), McCaffrey proceeded to commit a clear violation of 26 U.S.C. 7213 (a) (1), 18 U.S.C. 1905, and the regulations of the Treasury Department by disclosing to Glassman highly confidential information concerning the Bergman tax case (R. 251-252). McCaffrey knew, at the time, that Gorin was the attorney of record (R. 504) and he knew, also, that the disclosure of the information to Glassman was a violation of law (R. 454, 459, 463).

What particularly deserves the attention of this Court, we submit, is whether McCaffrey must also be held to have known that he was handing Glassman his credentials of authority from the Government for use in the solicitation of Gorin and Bergman. This, indeed, on Glassman's testimony, is what occurred. Gorin was understandably amazed when Glassman was able to repeat to him the civil tax deficiencies and other significant data in the Bergman case (R. 1150, 1154). Had McCaffrey not put into Glassman's hands the proof of Glassman's ability to obtain a favorable result in the case, Gorin, out of zeal for his client, would never have been subjected to the powerful temptation of virtually guaranteed results upon the mere procurement of a legal "fee" from his client.

Apparently not satisfied that he had armed Glassman sufficiently for the task at hand, McCaffrey, on June 21, took Glassman aside after a VTU meeting and asked, "Will anyone want to read this criminal action memorandum?"

(R. 346). The purpose, of course, was to suggest that it be shown to Gorin, the attorney of record. Glassman responded by saying he had better look at it himself, whereupon McCaffrey volunteered to bring a rough draft to Glassman's office on the following Tuesday, June 27 (R. 346-347).

Then, during the meeting at Glassman's office on June 27, McCaffrey finally became specific and named Gorin as the person who should be shown the CAM (R. 558-559). He made the suggestion knowing full well that Glassman's possession of the CAM would be considered extraordinary by Gorin (R. 944). As he should be held to have known, too, this could only serve further to persuade Gorin that Glassman was acting on behalf of a Government official and that that official desired any assistance requested by Glassman. Accordingly, and precisely as anticipated by McCaffrey, Gorin, upon being shown the CAM on June 27, within the next ten days delivered to Glassman the pre-dated letter requested by McCaffrey (R. 275-276, 1121).

Prior to June 1, when McCaffrey disclosed the confidential information to Glassman, nothing in what Glassman told Gorin could have put Gorin on notice of anything but that Glassman hoped, within the area of official discretion, to use a pre-existing friendship as a strictly implicit basis of professional dealings with a person in the office of the Regional Counsel. Then, after being shown Glassman's credentials in the form of his display of knowledge concerning the Bergman case, Gorin participated in the payment of the "fee" to Glassman. Even at this point, however, there is no evidence that Gorin knew of Glassman's intention to give McCaffrey a bribe. Thereafter, Gorin remained inactive until June 27 when he was told by Glassman of the payment to McCaffrey. At that time, he was shown the CAM as further proof of Glassman's credentials and requested to write a pre-dated letter, as

first suggested by McCaffrey. This, together with the delivery of an ordinary legal brief to Glassman, was the full extent of Gorin's participation up until July 19.

The period from June 27 to July 19 had been spent by McCaffrey in trying to prod Grillo into action, without success. Then, on July 19, McCaffrey turned his attention again to Gorin, with the subtle suggestion to Glassman that he be permitted to call Gorin directly concerning the Hurney letter (R. 377). Some pre-conditioning of Gorin was also added by McCaffrey's message to him in the form of the statement to Glassman, "And Gorin, I hope, will say, 'Look, Mac, I'll take care of it.'" (R. 659).

The rest was comparatively simple. For more than three weeks Gorin had known that McCaffrey had accepted a bribe from Glassman and had had ample time to condition himself to the evil reality of the situation. He could interpret the call from McCaffrey on the morning of July 20 only as a direct solicitation of assistance in furthering the criminal design.

With respect to the period commencing after the payment of the bribe, there is also presented here the question as to the extent to which the Government may go in perpetuating a conspiracy by the use of suggestions to action which are thereafter charged as overt acts, and used as evidence, in support of an indictment charging a conspiracy and the related substantive offense.

Specifically: the second overt act of the conspiracy count charged that Glassman made a photostat of the CAM (R. 16-17). McCaffrey admitted, however, that he told Glassman to make the photostat (R. 556-557).

The third overt act charged that Glassman delivered a pre-dated letter from Gorin to McCaffrey (R. 17). McCaffrey admitted that he told Glassman to have Gorin write the letter (R. 644).

The eighth and tenth overt acts charged that copies of

reports were requested of McCaffrey and obtained by Bergman and Gorin (R. 17-18), whereas McCaffrey admitted that it was he who suggested this to Bergman and Gorin (R. 693, 899, 903).

The ninth overt act alleged that, on August 15, at McCaffrey's office, all the defendants discussed the Bergman case with McCaffrey (R. 17-18). This is the very same conference which came about as the result of McCaffrey's insistent, repeated demands of the evening before that Gorin and Bergman obtain the presence of Grillo in McCaffrey's office (R. 633-638). Indeed, McCaffrey admitted that he did everything he could to bring the conference about in accordance with instructions from the Inspection Service (R. 640).

Finally, with respect to the period commencing July 20, there is presented the novel question as to how far a Government agent, masquerading as a friend, may go in inducing an unsuspecting person to speak words which of themselves constitute the commission of a crime or, at least, furnish evidence of it. For example, on two occasions McCaffrey asked Gorin the direct question whether Gorin had paid a bribe to Grillo in connection with the Bergman case. On both occasions, Gorin responded that he had (R. 554). However, the question was asked on occasions at which McCaffrey had manifested considerable displeasure at Grillo's inactivity in the Bergman case. Under the circumstances, any other answer by Gorin would only have brought McCaffrey's wrath upon him, personally, and attempted an end to what were probably his future personal liberty of Gorin's client, Bergman. In its other aspect, the question is whether the Government may use, as evidence of a predisposition to commit the offense charged, words which are themselves the product of an entrapment. What has been said concerning Gorin and Glassman applies equally to Grillo. As of August 15, he had taken no

action whatsoever to assist Bergman in the Office of Regional Intelligence. Then, on that date, he was lured into a conference with Gorin and McCaffrey, the attorneys for the taxpayer and the Government, respectively. In such a situation, he responded, quite understandably, by diplomatically appearing to be in sympathy with their stated desires and then returning to his office to do absolutely nothing to help.

The comprehensive question presented here is whether the law of entrapment can be developed to meet highly sophisticated methods of inducement to crime, which avoid the clumsy, direct solicitations heretofore condemned by this Court. This, and the aforementioned subsidiary questions, are the important questions of the federal law of entrapment which have not been, but should be, settled by this Court.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Appendix A

United States Court of Appeals

For the First Circuit

No. 5997. PAUL A. GORIN,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE;

No. 5998. HENRY GRILLO,

DEFENDANT, APPELLANT,

v.

SAME;

No. 5999. SAUL GLASSMAN,

DEFENDANT, APPELLANT,

v.

SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Francis J. DiMento, with whom *DiMento & Sullivan* was on brief, for Paul A. Gorin, appellant.

Manuel Katz, with whom *Paul T. Smith* was on brief, for Henry Grillo, appellant.

James D. St. Clair, with whom *Blair L. Perry* and *Hale and Dorr* were on brief, for Saul Glassman, appellant.

John J. Curtin, Jr., Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, *William F. Looney, Jr.*, and *Paul A. M. Hunt*, Assistant U. S. Attorneys, were on brief, for appellee.

OPINION OF THE COURT.

February 20, 1963.

WOODBURY, *Chief Judge.* These three appellants and one Nathaniel Bergman of Hartford, Connecticut, were indicted by a grand jury in the court below on three counts. Count 1 charges the three appellants and Bergman with conspiring (1) to bribe one Charles J. McCaffrey, an employee of the Internal Revenue Service of the United States Department of the Treasury, and (2) to defraud the United States in its governmental functions by depriving it of McCaffrey's conscientious, honest and faithful service in violation of Title 18 U.S.C. § 371. Count 2 charges Bergman and the appellants Glassman and Gorin with giving McCaffrey $10,000 with intent to influence his decision and action on a matter at the time pending before him in his official capacity, in short with bribery, in violation of Title 18 U.S.C. § 201. Count 3 describes Grillo as a United States officer acting in connection with the revenue laws of the United States and charges him alone with conspiring with the other three, who were named as co-conspirators but not as co-defendants, to defraud the United States in its governmental functions in violation of Title 26 U.S.C. § 7214(a)(4).

Following the denial of a number of preliminary motions to be discussed presently, the four defendants were tried by jury on pleas of not guilty, were found guilty as charged and were sentenced. All appealed, but Bergman withdrew his appeal before hearing.

Before the trial began each defendant moved to dismiss the indictment and to strike the entire panel of petit jurors on the ground that both the grand and petit jurors had been improperly selected. The motions were denied after a hearing at which evidence was taken.

The evidence adduced shows that the jury commissioners of the United States District Court for the District of

Massachusetts selected persons for service as jurors from the jury lists of the various cities and towns in Massachusetts, that the City of Boston was within the part of the district designated by the district court under Title 28 U.S.C. 1865(a) as the source from which the jurors with whom we are here concerned were drawn, and that the Boston Election Commission, the body charged by local law with the annual preparation of jury lists for the City of Boston, picked jurors at random from the lists of registered voters in the various wards of the city and then, by reference to the list of inhabitants prepared annually by the city police department, weeded out those exempt by law because of their occupations, such as clergymen, lawyers or doctors, and following this by personal interviews weeded out those physically or mentally unfit for jury service and those with an inadequate command of the English language. The contention is that the jury commissioners' method of selection, resting as it does in part upon the method of selection used in Boston by the Boston Election Commission (it does not appear whether the same method of selection was used by local authorities in the other cities and towns of the part of the district involved), violates § 1861 of Title 28 U.S.C. quoted in material part in the margin[1] because it automatically excludes citizens who are not registered to vote. The argument is that eligible voters who have not registered constitute a definite group or class in the community, that is to say, an apolitical or politically dormant group, and that exclusion of that class or group from jury service results in juries which do not represent "a cross-section of the community" as required, so it is said, by *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946).

[1] "Any citizen of the United States who has attained the age of twenty one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror. . . ."

The argument rests upon too literal a reading of the phrase quoted above, for it has never been the law that a jury must represent a true cross-section of the community. See Report of the Committee on the Operation of the Jury System to the Judicial Conference of the United States, September 1962 at page 6. Certain groups, as by 1862 and 1863 of Title 28 U.S.C., are and time out of mind have been exempted from jury duty, some for the general public interest, such as public officials or members of the armed forces, and others, such as convicted felons, minors and persons unable to understand the English language, for the effective operation of the jury system. And the Court in the *Thiel* case clearly recognized the established practice of exempting certain persons from jury service by explaining that what it meant by the sentence wherein it used the phrase "a cross-section of the community" was only that prospective jurors must be selected by court officials without systematic and intentional exclusion of any economic, social, religious, racial, political or geographical group in the community.

For a variety of reasons we reject the argument that eligible persons who do not register to vote constitute a "political" group in the community. In the first place the group does not include only the politically inert. It includes also the politically alert who may perhaps have lived for a year or more in the district but not long enough in their ward to be eligible to register to vote. In the second place, the group has no distinct or definable outlines, for in addition to persons who have just moved into a ward, it includes not only the completely apathetic but also those who might register to vote only when interested in a particular election. It includes persons of varying shades of political interest. And in the third place we think the Court in referring to a political group in the *Thiel* case

meant the members of some defined political party or group.

This does not mean blanket endorsement of jury selection directly or indirectly from voting lists. It means that voting lists may be used as the basis for jury selection unless it appears that in the community there is systematic and intentional exclusion from those lists of a particular economic, social, religious, racial, geographical or political group. When such a showing is made some other basis of selection must be used. Here, however, the appellants have not shown that in Boston any enumerated class is systematically and intentionally discriminated against in registering to vote. Indeed the evidence is quite to the contrary. The appellants' contention fails for lack of any evidence of discrimination in the preparation of the lists of Boston voters. Compare *United States* v. *Hoffa*, 196 F. Supp. 25 (S.D. Fla., 1961), with *United States* v. *Greenberg*, 209 F. Supp. 382 (S.D.N.Y., 1961).

Also before trial the appellants severally moved to dismiss the indictment because it had been returned by grand jurors calculatedly prejudiced against them by government-inspired publicity. We think the court below very properly denied the motions."

The appellants characterize the publicity of which they complain as "massive," and describe it as "blanketing" the Commonwealth of Massachusetts. It boils down, however, to news releases printed in local newspapers and repeated in substance over radio and television on August 26, 1961, the day two of the appellants and Bergman were arrested, and for the next two days, purporting to quote the Attorney General as extolling the vigor, skill and integrity of the Internal Revenue Service and as saying that the Charles J. McCaffrey mentioned in the indictment had reported Glassman's offer to bribe him to his superiors and upon their instructions had pretended to go along with

the plan and "is a courageous American and typifies the loyalty and integrity of the men of the Internal Revenue Service."

The appellants admit that their contention "presupposes" that there is either a right under the Fifth Amendment of the Constitution of the United States to be indicted by grand jurors free of calculated government-instigated prejudice or else that proper standards for enforcement of the criminal law in the federal courts sanction only indictment by a grand jury uninfluenced by improper forces generated by the prosecutor. They must also "presuppose" that they do not need to show that in fact the grand jury which indicted them did not perform its sworn duty to act with impartiality but instead was actuated by government-inspired bias and prejudice. We are not prepared to grant these "presuppositions." So far as we are aware, none has the sanction of any decision of the Supreme Court of the United States and all have been rejected in one or another carefully considered opinion of a lower federal court. See *United States* v. *Nunan*, 236 F.2d 576, 592 *et seq.* (C.A. 2, 1956), *cert. den.*, 353 U.S. 912 (1957); *Beck* v. *United States*, 298 F.2d 622 (C.A. 9, 1962), *cert. den.*, 370 U.S. 919 (1962); *United States* v. *Dioguardi*, 20 F.R.D. 33 (S.D.N.Y., 1956); *United States* v. *Hoffa*, 205 F. Supp. 710 (S.D. Fla., 1962). But even if we should accept the "presuppositions," which we by no means imply, we would still reject the appellants' contention.

We do not approve of pretrial publicity, particularly when it emanates from prosecuting officials. In the interest of fair trial it is better avoided. But the publicity here complained of was minor. It was not continuous but was pretty much a single-shot affair. And although it related to serious crimes involving corruption of public officials, it did not relate to a spectacular crime likely to arouse strong public emotion, excitement or passion such as murder or

rape. Nor did the publicity vilify or heap opprobrium on the appellants. It only endorsed the character, and thereby inferentially the credibility, of the government's principal witness. We do not think the publicity complained of was serious enough to warrant the drastic remedy of dismissing the indictment, if, indeed, that remedy is available at all.

Pretrial motions for severance were also made and denied and similar motions were repeated intermittently throughout the trial but in every instance denied.

Clearly joinder of the defendants in the indictment was proper under Criminal Rule 8(b). To obtain severance it was, therefore, incumbent on the appellants to make such a strong showing of prejudice as to invoke the discretionary remedy provided in Criminal Rule 14 entitled "Relief from Prejudicial Joinder." This the appellants have undertaken to do for a variety of reasons.

Glassman and Grillo argue for severance for the reason that the testimony of co-defendants is essential to their defense and, they say, it is not available to them unless each defendant is tried separately so that they can put co-defendants on the stand. The argument is unrealistic. There is no reason to think that a co-defendant would be any more willing to waive his constitutional privilege against self-incrimination when called as a witness at a separate trial than he would be willing not to insist upon his privilege as a defendant not to take the stand. Moreover, in *Olmstead* v. *United States*, 19 F.2d 842, 847-48 (C.A. 9, 1927), affirmed as to other matters 277 U.S. 438 (1928), it was held that the inability of a defendant in a conspiracy case to use the testimony of co-defendants in his defense is not enough to show abuse of discretion in refusing a motion for severance.

Another argument for severance was particularly emphasized by counsel for Grillo in the court below. It deserves mention since it applies to some extent to all appel-

lants and was advanced for all in this court. Grillo's argument below was that at the trial he would be confronted with so much testimony of so many acts and statements of other defendants not in his presence and without his authorization or knowledge that in spite of limiting instructions[2] the jury could not possibly overcome the prejudicial effect of the testimony or consider his case on its own individual merits.

Grillo's fear is not unfounded. See the late Mr. Justice Jackson's concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 445, particularly at 453 (1949). But no case has been cited to us and we are not aware of any holding that it was an abuse of discretion not to grant severance for the reason advanced. While the potentiality of prejudice certainly exists, it is far greater when the number of conspirators involved is large. The prejudice asserted in this case seems pale indeed when compared with the prejudice involved when fifty-nine conspirators were tried without severance in *Capriola* v. *United States*, 61 F.2d 5, 11 (C.A. 7, 1932), *cert. den.* 287 U.S. 671 (1933), or seventy-five in *Allen* v. *United States*, 4 F.2d 688, 698-99 (C.A. 7, 1925). It is well established that the granting of a motion for severance lies in the discretion of the trial judge. *Stilson* v. *United States*, 250 U.S. 583, 585-86 (1919). In the absence of a far stronger showing than is made in this case we would not be warranted in finding that discretion had been abused.

Our function as an appellate court is to examine the record with care to make sure that the trial court minimized possible prejudice. This we have done, and from a reading of the record it seems obvious to us that the trial judge went to no little pains to give appropriate limiting in-

[2] That is to say, instruction that such testimony is not admissible as against Grillo until the government has first established not only the existence of a conspiracy but also Grillo's membership in it.

stragtions at the outset of the trial, throughout its course, and finally and at length in his charge, which, counsel for Grillo admits in his brief, was "literally correct on this point." We do not believe that it was incumbent on the court below to interrupt the trial with limiting instructions every time the name of an absent co-conspirator was incriminatingly mentioned. In this four-defendant conspiracy case we can repeat what Circuit Judge Hincks said in the eighteen-defendant case of *United States* v. *Stromberg*, 268 F.2d 256, 265 (C.A. 2, 1959), *cert. den.* 361 U.S. 863 (1959), that is to say: " . . . we think it by no means a task of insuperable difficulty for the jury to comply with the judge's instructions and determine as to each defendant the issue of membership in a single continuing conspiracy on the basis of the independent evidence *i.e.*, the evidence as to his own acts and admissions."

We come now to the trial itself.

At its outset in accordance with the practice sanctioned by Criminal Rule 24(a) the *voir dire* examination for prospective jurors was conducted not by counsel but by the court. The appellants do not challenge the practice. And they concede that a trial judge undoubtedly has "a broad discretion as to the questions to be asked" of prospective jurors, subject only "to the essential demands of fairness." *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931).[3] Their contention is that the "essential demands of fairness" required the trial judge to ask prospective jurors a variety of specific questions to determine possible bias or prejudice, such as whether they had any prejudice against lawyers or against persons "with income tax problems," whether they would think someone guilty because he had been charged with crime and arrested, whether they would give more credence to a government agent than to a lay

[3] In this case there is no question of racial prejudice, as in *Aldridge*, or as in *Frasier* v. *United States*, 267 F.2d 62, 66 (C.A. 1, 1959).

witness and whether they would have any prejudice against a client because his counsel objected to the admission of evidence. We see no abuse of discretion in failing to put these questions to prospective jurors. As to these matters the court's general questions coupled with its charge afforded the appellants ample protection.

Particularly, however, the appellants object to the refusal of the court to ask prospective jurors specifically whether they had read or heard of the statement attributed to the Attorney General with respect to the integrity and courage of Charles J. McCaffrey discussed hereinabove, and, if they had, whether the statement would affect their judgment in passing upon McCaffrey's credibility as a witness. The questions were not impertinent. But the court below may well have felt that putting the specific question would call the publicity to mind and perhaps do appellants more harm than good. Under the circumstances of this case, particularly the "one-shot" nature of the publicity, we think the court gave the appellants adequate protection when it allowed jurors to sit upon receiving a "No" answer to the question: "Are any of the jurors familiar with the facts of this case, either personally or through the press, radio, or television or any other means?"

We come now to consideration of the facts adduced at the trial.

Nathaniel Bergman was an attorney-at-law practicing in Hartford, Connecticut. In 1959 a special agent attached to the Hartford District Office of the Internal Revenue Service, IRS hereinafter, began an investigation of Bergman's income tax returns for preceding years. Bergman retained local counsel and in February, 1961, he also retained the appellant Paul Gorin, who was a lawyer practicing in Boston in the field of federal taxation. On May 1, 1961, the Intelligence Division of the Boston Regional

Office received the special agent's report of his examination of Bergman's tax returns recommending criminal prosecution of Bergman and his wife for tax evasion. Regional Intelligence agreed with this recommendation and forwarded the case to the Enforcement Branch of the Boston Regional Counsel's office, wherein lay the duty on review to recommend for or against criminal prosecution in federal tax cases arising in the area.

The head of the Enforcement Branch at this time was the Charles J. McCaffrey to whom we have referred. He had come to Boston from similar duty in San Francisco in July 1959 and by April 1960 had met the appellant Glassman, who was a lawyer in the general practice in Boston specializing "more or less" in the law of real property. Both were retired officers of the United States Marine Corps and they first met at an organizational meeting of a Marine Corps Reserve voluntary training unit (hereinafter VTU) consisting of reserve officers who were lawyers. Glassman was the commanding officer of the unit; McCaffrey was the training officer and next in command. Their relationship became cordial.

At this point the testimony diverges rather sharply. Glassman, who took the stand in his own defense, testified that on several occasions prior to the end of May 1961 when he and McCaffrey met socially, or at VTU meetings, or to plan the training program for the unit, they discussed the general nature of each other's work and McCaffrey urged him to take some courses and develop a tax practice, saying that the field was lucrative. Glassman said that he replied: "My practice just hasn't tended toward that" to which McCaffrey answered: "Well, just remember if you ever do hit a case you've got a good friend up there." Glassman also testified that when he and McCaffrey met at a social function in March 1961 McCaffrey expressed envy when he learned that Glassman was about to go to

Europe, said that he wished he and his wife could do the same and commented: "You can't save any money when you're working for the government and have a big family." And Glassman testified that on May 26, 1961, when he met with McCaffrey to discuss the quarterly training schedule for the VTU, McCaffrey again recommended a tax practice as profitable and said: "You know Paul Gorin, don't you?" Glassman said that he answered that he knew Gorin casually, to which he said McCaffrey replied: "He is certainly doing all right for himself. Saul, you should be doing some of that tax work. I am really in a position to help you out. Why don't you see Gorin and tell him you have got a good friend up at Enforcement. I think you can do yourself a lot of good."

McCaffrey agreed that prior to the end of May 1961 he and Glassman had discussed each other's professional work, a the course of which he had learned that Glassman was primarily a real estate lawyer. Furthermore, McCaffrey admitted that he knew that Glassman did not have a Treasury card that entitled him to represent clients before official bodies in the Treasury Department on tax matters, and he also admitted that he had recommended a tax practice to Glassman as profitable and had suggested that Glassman take some tax courses and enter that field. McCaffrey, however, categorically denied making the other remarks attributed to him by Glassman.

We turn now to the critical period of the alleged conspiracy, which began during the last days of May 1961. Glassman testified that he had known Paul Gorin for over ten years and that they were on a first name basis. He said that he happened to meet Gorin casually on May 27 and asked him if he had a tax fraud case that was going to prosecution. Glassman said that Gorin answered: "Yes. What do you know about it?" to which Glassman said he replied: "Nothing, but if you need any help I've got a

good friend up in Enforcement I could talk to." Arrangements were then made to discuss the matter further the following week and by appointment they met again on May 31. At that time, according to Glassman, Gorin identified the case he had referred to as a net worth case involving Nathaniel Bergman of Hartford, Connecticut, and asked Glassman if he thought he could "do anything." Glassman said he replied that he did not know but that he had "a good friend up in Enforcement" and that he would speak to his "friend" and "see what he has to say." Gorin asked: "When?" and Glassman replied: "I don't know. As soon as I can. I will call you."

McCaffrey and Glassman agree that Glassman did indeed telephone to McCaffrey on May 31. However their versions of the telephone conversation differ. Glassman said that he told McCaffrey that he wanted to talk about the Bergman case and that McCaffrey replied that the case had been assigned to one of the men in his office but she would look into it and call Glassman. McCaffrey testified that in that telephone conversation Glassman said he wanted to talk about a case but did not identify it, and that the request made him "uneasy" because he knew that Glassman had no power of attorney in any case in his office and therefore had "no right to talk to me about any case." McCaffrey also said that because of his "uneasiness," he did not attend a VTU meeting that night and immediately reported the telephone conversation to a senior attorney in Regional Counsel's office whom he asked to make a memorandum of his disclosure "just in case something happened."

On the next day, June 1, Glassman telephoned McCaffrey again [4] and in that conversation, according to McCaf-

[4] This is McCaffrey's version. Glassman testified that McCaffrey called him, said that he had the Bergman files on his desk and that Glassman could come over "anytime."

frey, for the first time identified the Bergman case as the one in which he was interested. Both agreed that later in the day Glassman went to McCaffrey's office. Their version of what there transpired differs. Glassman testified that McCaffrey greeted him with the remark: "Well, Saul, I see that you've talked to friend Gorin," and then proceeded to disclose facts and figures of the Bergman case to show that it would be prosecuted on a net worth basis and that it involved a very substantial sum in deficiencies. Glassman said that he asked McCaffrey: "Look, Mac, is this a case I should get involved in? Do you have to recommend prosecution or is this a case that can go either way?" to which he said McCaffrey replied that from what he knew of the Bergman case there had been other cases coming from Connecticut "that looked much worse and we recommended no prosecution." Glassman testified that he told McCaffrey that from the figures disclosed "this looks like a case where I can get a substantial fee if I can do Bergman some good," and that both agreed that they would look into the case further to "see how it shapes up." Glassman also testified that McCaffrey admitted that he ought not to be talking about the case because Glassman had no power of attorney and that when he asked if he should obtain one McCaffrey replied: "If anything develops you can work through Gorin. I know I can always talk to you as a friend."

McCaffrey agreed that he discussed the Bergman case face to face with Glassman on June 1. And he admitted that at the meeting he gave Glassman the amount of civil deficiencies involved in the case and that in doing so he violated the Regulations because Glassman had no power of attorney. Furthermore, he admitted that he would not have discussed the case with Glassman had he been a stranger. But he denied making the remarks attributed to him by Glassman and he said that Glassman in the

course of the meeting dropped the remark that in view of the sums involved "there should be enough of a fee in it for all of us." McCaffrey said he replied noncommittally to this remark and that as they parted Glassman said: "I will contact you before I set my fee in this matter."

McCaffrey testified that these remarks so aroused his suspicions that he immediately reported them to his superior officer, the Regional Counsel, saying that he thought Glassman might be intending to offer him a bribe, and that the Regional Counsel because of the doubtful meaning of Glassman's remarks agreed to let McCaffrey handle the matter in his own way. Although McCaffrey's report to his superior should have been in writing, his conduct was otherwise in accord with the Internal Revenue Manual which requires an IRS employee when approached with an offer of a bribe to make such reply as will hold the matter in abeyance and immediately make a full report in writing to a superior.

Meetings and telephone conversations followed between Glassman and Gorin, Gorin and Bergman, Glassman, Gorin and Bergman and Glassman and McCaffrey which do not need to be described in detail. It will suffice to say that on the evidence it might well be found that in the course of them Glassman convinced Gorin and Bergman that he indeed had a friend "up in Enforcement" and that Bergman, Glassman and Gorin were not averse to offering that "friend" a bribe to "kill" the case against Bergman. And there is evidence of remarks made during the first half of June by Glassman to McCaffrey not too subtly hinting that a bribe might be forthcoming if McCaffrey would recommend against prosecuting Bergman for tax evasion, to which, according to Glassman, McCaffrey lent definite encouragement.

At any rate on June 15 McCaffrey reported to his superior that he thought Glassman had bribery in mind and

also made the same report to the Inspection Service, the internal police force of the IRS charged among other matters with the duty of investigating bribery of IRS employees, which at once sent an inspector to Boston from New York to handle the case. The inspector told McCaffrey under no circumstances to initiate a contact but to "go along" with the persons involved, to meet them whenever they chose and to give them any document they wanted. And he also installed an array of electronic equipment in McCaffrey's office, in his car and at times on McCaffrey himself, whereby conversations in McCaffrey's presence could be recorded. After June 20, all McCaffrey's conversations with Glassman, Gorin and Bergman were electronically recorded with the exception of two telephone calls from McCaffrey to Glassman, one on July 7 and another on July 10, and a conversation on July 27 between Gorin and McCaffrey on a golf course. Other telephone conversations were recorded only on McCaffrey's side. These recordings were introduced into evidence and portions of them were played to the jury.

Further meetings between two or more of the four, McCaffrey, Glassman, Gorin and Bergman, followed, which there is no need to recount in detail. It will suffice to say that the upshot of the meetings was that on June 27 Glassman gave McCaffrey $5,000 in bills in return for a rough draft of a criminal action memorandum, known as a CAM, recommending against prosecution of Bergman for tax evasion, and that on June 28 Glassman gave McCaffrey a like amount in exchange for a finished draft of the document. There is ample evidence that Glassman obtained the money from Gorin who in turn had obtained it from Bergman, and that all well knew the purpose for which the money was to be used. Glassman admitted on the stand that the money was paid to McCaffrey as a bribe.

To state the facts in greater detail would expand this

opinion inordinately. Although we might go into far greater detail, we think we have stated enough to show that there was evidence from which the jury could properly find that Glassman, Gorin and Bergman had engaged in the conspiracy charged in the first count of the indictment and had given McCaffrey a bribe as charged in the second count. We also think that we have recounted enough to show a factual basis for the defense, Glassman's sole defense, of entrapment.[5]

We turn now to the case against Grillo.

Grillo was the Executive Assistant to the Assistant Regional Commissioner, Intelligence, for the Boston Region. As such he was second in command of the IRS unit to which McCaffrey as head of the Enforcement Branch of the Regional Counsel's Office submitted his recommendations against prosecutions for tax evasion. Although Grillo's duties were primarily administrative he assumed the duties of his superior, the Assistant Regional Commissioner, when the latter was not in his office, one of whose duties was to pass upon recommendations against the criminal prosecution of tax evaders.

There is ample evidence of remarks made by Glassman and Gorin, but not in Grillo's presence, to tie him into the conspiracy. For instance, there is evidence that on the afternoon of June 27 when McCaffrey went to Glassman's office to deliver the rough draft of his recommendation against prosecuting Bergman criminally, Glassman asked where the recommendation would be sent and when McCaffrey replied that it would go to the Assistant Regional Commissioner, Intelligence, and mentioned Grillo as a man in that office Glassman said: "That is the man. He has

[5] We reject the government's contention that there was no adequate evidence from which the jury could find that Gorin and Glassman had been entrapped and we also reject the latter's contention that the evidence shows entrapment as a matter of law.

been approached and he is ready for it." And there is evidence that on a later occasion Glassman asked McCaffrey to let him know before the recommendation against prosecution went out in final form "so they can tell Grillo that it's on it's way over and he can grab it." Furthermore, there is evidence that at a meeting in McCaffrey's office on the afternoon of August 14, 1961, at which McCaffrey, Bergman and Gorin were present, McCaffrey, referring to Grillo, asked Gorin: "Have you given him anything?" to which Gorin replied: "He has a balance with me of $20,000," and "He has built himself a new house, and I have got about $10,000 worth of furniture in there," and also: "On this case I have given him $1,500, and I promised him $2,500 more if the case is killed." On the same occasion Gorin is reported by McCaffrey to have said that Grillo, or Henry, "gave me information on this case long before it came in here, and before I talked to Bergman about it."

All of this evidence is, of course, quite inadmissible against Grillo unless and until there is independent evidence, that is, evidence of Grillo's own acts or admissions, connecting him with the conspiracy. We find enough such evidence in McCaffrey's account of a meeting in his office on August 15, 1961, with Gorin and Grillo. At that meeting, after McCaffrey and Grillo had briefly discussed another case, Gorin is reported by McCaffrey to have said that he wanted the others either to know or to remember, that he could not recall which, "that we are here as friends, f-r-i-e-n-d-s," spelling out the last word for emphasis. Following this introduction McCaffrey testified that Grillo said that in his superior's absence he could not act on McCaffrey's memorandum against prosecuting Bergman without getting into "difficulty," perhaps "serious difficulty," that he had not expected such a strong protest to McCaffrey's memorandum from the IRS office in Hartford to

which it had been referred and that he was finding it difficult in view of that protest to convince his superior and others in his office to approve McCaffrey's recommendation. And McCaffrey testified that with reference to the criminal prosecution of Bergman, Grillo said: "I would like to see it go by the board more than anyone else." Furthermore, McCaffrey testified, and the electronic recording of the meeting corroborates, that at the meeting Grillo participated actively in the discussion of arguments to advance in answer to the protest from Hartford to McCaffrey's memorandum and at the close of the meeting Gorin said: "Well, Henry, you've got the pitch now. The three of us are working together," to which Grillo replied: "I wish to hell I'd known it before."

Perhaps by straining the jury might have put an innocent interpretation on these remarks and acts of Grillo. But certainly the jury did not have to do so. The above evidence is clearly enough to warrant the jury's finding that Grillo was a participant in the conspiracy.

The appellants objected below to the introduction in evidence of the tape and wire recordings to which reference has been made. Since the electronic devices used were installed in McCaffrey's office, in his car and on his person, the recordings were not obtained through physical intrusion as in *Silverman* v. *United States*, 365 U.S. 505 (1961). Therefore, the appellants do not argue that the recordings were obtained in violation of the Fourth Amendment. Apparently conceding the authority of *Goldman* v. *United States*, 316 U.S. 129, 135 (1942), their contention is that the recordings are in so many places inaudible as to be unintelligible and therefore untrustworthy as evidence.

The court below followed the procedure approved in *Monroe* v. *United States*, 234 F.2d 49, 55 (C.A.D.C., 1956), *cert. den.* 352 U.S. 873 (1956), of having the recordings played in the presence of counsel but not in the presence

of the jury in order to rule on possible objections. After hearing the recordings their admissibility lay in the trial court's sound discretion. *Monroe* v. *United States*, supra; *Cape* v. *United States*, 283 F.2d 430, 435 (C.A. 9, 1960); *Todisco* v. *United States*, 298 F.2d 208, 211 (C.A. 9, 1961), *cert. den.* 368 U.S. 989 (1962). Although we have not listened to the recordings we have read the transcription of them in the record. While it appears that parts of them are inaudible, we cannot say that the parts which are not are without evidentiary value, or that the inaudible parts are so substantial as to make the rest more misleading than helpful. In short, we cannot say that the trial court abused its discretion in admitting the recordings in evidence.

Now we turn to the charge, specifically to the charge on the issue of entrapment.

The court below told counsel at the close of their arguments that it was going "to follow Learned Hand" and charge the jury that the burden was on the defendants to prove inducement. In summing up its general instructions on the issue it did so by saying: "Let me repeat that now. The two questions:- Did an agent of the government induce the accused to commit the offense in the indictment? If so, was the accused ready and willing, without persuasion, and awaiting a propitious opportunity to commit the offense? On the first question the accused has the burden of proof. On the second, the prosecution has the burden of proving it beyond a reasonable doubt."[6]

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[6] Judge Learned Hand, writing for his court in *United States* v. *Sherman*, 200 F.2d 880, 882-83 (C.A. 2, 1952), said: "Therefore in such cases two questions of fact arise: (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persausion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it."

The appellants concede that the court's formulation of the two questions and its summary of them was correct. But they contend that it was error to cast the burden of proving the first question upon them.[7] They argue that the defense of entrapment is analogous to the defense of insanity. Wherefore they concede that the government need not offer evidence to disprove entrapment as part of its case in chief. But they say that once they have come forward with substantial evidence of entrapment the burden is on the government to disprove the defense beyond a reasonable doubt.

The Supreme Court has not adverted to the question.

In *Sorrells* v. *United States*, 287 U.S. 435 (1932), the Court for the first time recognized entrapment as a defense to a criminal charge,[8] saying at page 451:

> "The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it. The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue."

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[7] They, of course, do not complain of the charge as to the burden of proof on the second question.

[8] It also held that the defense did not have to be pleaded in bar but could be raised under the plea of not guilty.

And the Court held that when the evidence of the conduct of the government's representatives was conflicting it was error to refuse to submit the issue of entrapment to the jury.

These basic principles were affirmed in *Sherman* v. *United States*, 356 U.S. 369 (1958). In that case involving illegal sales of narcotics, the Court at page 371 said: "At the trial the factual issue was whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade." Then, on page 372, citing with approval and quoting from the *Sorrells* case, the Court noted that it did not constitute entrapment for government agents merely to afford opportunities or facilities for the commission of an offence but that entrapment occurred "only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials. (Emphasis supplied.)" Wherefore, the Court said: "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

In drawing this line on the principles outlined in the *Sorrells* case, the Court in *Sherman* at page 373 said:

> "On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence."

In short, if an accused asserts that he is a lamb who has been led astray he must be prepared to face evidence that he is a wolf on the prowl.

The above cases clearly sanction Judge Learned Hand's

formulation of the two questions of fact presented by the defense of entrapment which the court below followed in its charge to the jury. For convenience they can be called the primary issue of inducement and the rebuttal issue of predisposition. And the cases also clearly indicate, as the appellants herein concede, that to raise the defense of entrapment the burden is upon them to come forward with evidence of inducement. We also assume from the language used as well as by application of general legal principles that the burden is on the government to come forward with evidence of predisposition. The cases, however, do not even indirectly mention the question of burden of persuasion on the issues. Nor do the cases give us guidance to decide the question by indicating the basis upon which the defense rests.[9]

The lower federal courts have variously allocated the burden of persuasion, usually with little if any helpful analysis. Indeed, in many of the cases it is uncertain whether when speaking of the burden of proof the court is referring to the burden of coming forward with evidence or the burden of persuasion. We shall undertake our own analysis.

The defense of entrapment is certainly analogous to the defense of insanity in that the burden of coming forward with evidence in order to raise the defense rests upon the accused. But at this point we think the analogy ceases.

The defense of insanity asserts that the mental condition of the accused is such that he is incapable of harboring criminal intent. The defense, therefore, negatives an essential element of the crime. And it is fundamental doctrine that the government must prove every essential element of the crime alleged beyond a reasonable doubt. The

[9] See Mr. Justice Frankfurter's opinion concurring in the result in *Sherman*, in which Justices Douglas, Harlan and Brennan concurred, page 378.

defense of entrapment, on the other hand, does not negative an element of the crime, or assert that the accused has not engaged in a criminal activity. By the defense the accused may admit his crime, as Glassman did on cross-examination when he admitted that he gave McCaffrey $10,000 "as a bribe," or he may rely upon his right to require the government to prove the case against him beyond a reasonable doubt, and in either event ask to be relieved of its consequences because of the unsavory tactics of representatives of the government.[10] Stated another way, the defense of entrapment is not interjected to establish the absence of an essential element of the crime but to present facts collateral or incidental to the criminal act to justify acquittal on the ground of an overriding public policy to deter instigation of crime by enforcement officers in order to get a conviction.[11] Since by the defense the accused is asking to be relieved of the consequences of his guilt, if found or admitted, by objecting to the tactics of the representatives of the government, we think that one who raises the defense should be required not only to come forward with evidence but should also be required to establish inducement by a preponderance of the evidence.

We think reason commends this conclusion. And it is in accord with § 2.13 entitled Entrapment, Subsection (2).

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[10] It is inconsistent for an accused to take the stand and deny the commission of the crime charged and then assert his right to a charge on the defense of entrapment. See *Sylvia* v. *United States*, decided by this court January 22, 1963. However, where there is evidence of governmental inducement, it is not fatally inconsistent for an accused to keep silent in the hope that the jury will not find that the government has proved its case beyond a reasonable doubt, but ask that the jury be charged on the defense of entrapment if it should find the commission of the allegedly criminal acts. The law allows this much inconsistency. See *Henderson* v. *United States*, 237 F.2d 169, 172-73 (C.A. 5, 1956).

[11] See the separate opinion of Mr. Justice Roberts, Mr. Justice Brandeis and Mr. Justice Stone concurring, in *Sorrells* v. *United States*, 287 U.S. 435, 456 *et seq.*

of the Proposed Official Draft of the American Law Institute's Model Penal Code, dated May 4, 1962, which provides with an exception not here material that "a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment." See also the discussion of this provision in Tentative Draft No. 9, of the Model Penal Code, *supra*, 1959, at the bottom of page 20 and the top of page 21.

We think the charge of the court below was correct as far as it went. It did not, however, in our opinion, go far enough, for it did not tell the jury anything about the *quantum* of the proof required. It merely informed the jury that the accused had the "burden of proof" without explaining that the burden was met by proof by a preponderance of the evidence.

Although this omission was brought to the court's attention after the charge, it did not see fit to elaborate. We think this was prejudicial error. The only burden of proof mentioned anywhere in the charge was the burden on the government to prove the essential elements of its case beyond a reasonable doubt. But from this we cannot assume, as the government argues, that the jury would apply this standard only to the government's case and never to the defendants'. On the contrary we think that since proof beyond a reasonable doubt was the only standard mentioned, the jury would naturally infer in the absence of instruction otherwise that when "burden of proof" was mentioned that was the standard they were to apply, not only to the government but also to the defendants. There must be a new trial as to all three appellants.[12]

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[12] We find no adequate support for the government's contention that Grillo waived entrapment as a defense and is estopped from asserting it now.

Many other questions have been argued on these appeals. We pass them for various reasons, some for insubstantiality, and others because they are unlikely to arise at another trial or at least are unlikely to arise in the same form or in the same context.

Judgments will be entered vacating and setting aside the judgments of the District Court and remanding the cases to that Court for a new trial.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5997.

PAUL A. GOBIN,
DEFENDANT, APPELLANT;

v.

UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
February 20, 1963

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside and the case is remanded to that Court for a new trial.

By the Court:
(s) ROGER A. STINCHFIELD,
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5998.

HENRY GRILLO,
DEFENDANT-APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
February 20, 1963

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside and the case is remanded to that Court for a new trial.

By the Court:
(s) ROGER A. STINCHFIELD,
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5999.

SAUL GLASSMAN
DEFENDANT, APPELLANT,

UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
February 20, 1963

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside and the case is remanded to that Court for a new trial.

By the Court:
(s) ROGER A. STINCHFIELD,
Clerk.

Appendix C

18 U.S.C., sec. 201

"Sec. 201. *Offer to officer or other person*

"Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be. . . ."

18 U.S.C., sec. 371

"Sec. 371. *Conspiracy to commit offense or to defraud United States*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be . . ."

18 U.S.C., sec. 1905

"Sec. 1905. *Disclosure of confidential information generally*

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be . . ."

26 U.S.C., sec. 7213(a)(1)

"Sec. 7213. *Unauthorized disclosure of information*

(a) *Income returns.*

(1) *Federal employees and other persons.*—It shall be unlawful for any officer or employee of the United be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or ex-

amined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be . . ."

26 U.S.C., sec. 7214(a)(4)

"Sec. 7214 *Offenses by officers and employees of the United States*

"(a) *Unlawful acts of revenue officers or agents.*—Any officer or employee of the United States acting in connection with any revenue law of the United States—

:

(4) who conspires or colludes with any other person to defraud the United States; or

shall be . . ."

28 U.S.C., sec. 1861

"Sec. 1861 *Qualifications of Federal jurors*

Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental of physical infirmities to render efficient jury service."

Mass. G. L. c. 234, sec. 1

"Sec. 1. *Qualification; exemptions.* A person of either sex qualified to vote for representatives to the general court, whether a registered voter or not, shall be liable to serve as a juror, except that the following persons shall be exempt:

The governor; lieutenant governor; members of the council; state secretary; members and officers of the senate and house of representatives during a session of the general court; judges and justices of a court; county commissioners; clerks of courts and assistant clerks and all regularly appointed officers of the courts of the United States and of the commonwealth; registers of probate and insolvency; registers of deeds; sheriffs and their deputies; constables; marshals of the United States and their deputies, and all other officers of the United States; attorneys at law; settled ministers of the gospel; officers of colleges; preceptors and teachers of incorporated academies; registered practicing physicians and surgeons; persons over seventy years of age; persons under twenty-five years of age; members of the Ancient and Honorable Artillery Company; members of the volunteer militia; superintendents, officers and assistants employed in or about a state hospital, insane hospital, jail, house of correction, state industrial school or state prison; keepers of lighthouses; conductors and engine drivers of railroad trains; teachers in public schools; engineers and members of the fire department of Boston, and of other cities and towns in which such exemption has been made by vote of the city council or the inhabitants of the town; Christian Science practitioners and readers, respectively; women trained nurses; women assistants in hospitals; women attendant nurses; mothers of children under sixteen years of age or women having custody of such children and women members of religious orders."